It is possible to invalidate this order on the strength of indisputable economic theory that applies to a set of facts that are exhibited on the face of the record. So long as the rate order on its face requires the regulated industries to do business at a loss under its terms, then the order will be struck down as a violation of the takings clause.

The central teaching in AT & T, moreover, has not been undermined by the recent decision in MCI Telecommunications Corp. v. FCC, 59 F.3d 1407 (D.C. Cir. 1995). That decision qualified the earlier ruling in AT & T, but largely on the strength of the FCC's factual representations that there was no "unique balance" point in the rate structure, below which there is confiscation and above which there is supracompetitive returns. The affirmation of the FCC decision rested on the assumption that the inability of any LEC to earn the maximum allowed rate of return "does not necessarily mean that any LEC earned less than the minimum amount necessary to attract capital. . . ." Id. at 1412. On that specific factual assumption, the factual predicate of AT & T no longer holds. Once the maximum allowable rate was set above the balance point, it no longer is possible to tell from the face of the record that the LEC will not be able to attract sufficient capital to earn an appropriate rate of return on its regulated business. The basic legal proposition of AT & T, however, remained unchallenged: where the pricing system in question was certain to result in a loss on the specific services covered by the rate order, then the per se challenge on takings grounds is correct. Since the compensation provided the LECs under the Commission's NPRM is below that necessary to cover their costs, the AT & T decision still supplies the applicable rule for judgment.

Looking more broadly, the two major propositions urged here are supported by other case authority. The first of these propositions concerns the obligation to provide just compensation for all interconnection orders, and is supported manifestly by the early case of Pacific Telephone Co. v. Eshleman, 166 Cal. 640, 137 P. 1119 (1913). The state railroad commission (which had jurisdiction over all public utilities) ordered Pacific Telephone to make interconnections to its long distance network to two local phone companies. After an exhaustive review of the subject, the Court concluded that the interconnection orders were a taking of Pacific Telephone's property, or what amounted to the same thing, a taking of the use of that property, for which compensation was required under the eminent domain power. Id. at 684-685.

The second proposition concerns the practical need to preserve the integrity of each individual ratemaking proceeding, which is illustrated by the early Supreme Court decision in Board of Public Utility Commissioners v. New York Telephone Co., 271 U.S. 23 (1926). In that rate proceeding, New York Telephone successfully challenged a rate order that required it to treat "excess depreciation" in earlier periods as part of the compensation that it received for its current operations. The Court first assumed that the Board's determination that excess depreciation had been allowed in earlier periods was correct. Id. at 30-31. But it then insisted that the Board could not reduce the amount of depreciation in the current period by a similar amount, where the effect of that reduction was to increase the reported income in the current period. The Court's basic position was that the telephone company, not its customers, owned the underlying assets:

> Past losses cannot be used to enhance the value of the property or to support a claim that the rates for the future are confiscatory. And the

law does not require the company to give up for the benefit of its future subscribers any part of its accumulations for past operations. Profits of the past cannot be used to sustain confiscatory rates for the future. Id. at 31-32.

The logic behind this position is impeccable. Each rate determination is a separate proceeding complete and entire unto itself. The principle is one of perfect neutrality, for it prevents the company from recouping past losses out of future revenues, just as it prevents the Public Utility Commission from using past profits as an offset against future gains. The advantage of this position is that it brings all rate hearings to a closure, and so long as the errors in question are unbiased, produces the appropriate levels of return over the long run. The same principles apply in this proceeding. The integrity of this bill and keep proceeding requires that its internal accounting be correctly done. The losses that are imposed in these transactions are not set off by some hypothetical gains, past or future, in some other regulated market.

B. The Investment-Backed Expectations Test of Penn Central Transportation Co. v. New York City is not Inconsistent with the Above Analysis.

Somewhat surprisingly, many of the submissions made on behalf of the proposed bill and keep order have relied on Penn Central Transportation v. New York City, 438 U.S. 104 (1978). The first point to note about this case is that it deals with landmark preservation statutes and not with any form of ratemaking for regulated industries. The decision in Hope, and indeed the entire line of ratemaking cases are nowhere discussed or cited in that decision. Rather, the Court in sustaining the application of New York City's ordinance noted that

> the Court's decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, a relevant consideration. So, too, is the character of the governmental action. A "taking" may more readily be found when the interference with property can be characterized as a physical invasion by government.

438 U.S. at 124.

The specific relationship of this test to the land use issues presented in the case is evident as well from the discussion that follows, where the court notes that under the police power, that is out of a concern for "the health, safety, morals, or general welfare, "this Court has upheld land-use regulations that destroyed or adversely affected recognized real property interests." Id. at 125. That statement in turn is consistent with the articulated legislative rationales for the landmark preservation statutes: the need to protect landmarks from being destroyed notwithstanding their "historic, cultural, or architectural significance to enhance the quality of life for all." Id. at 108. Those issues are a far cry from the questions of cost recovery that are the sole source of concern in this proceeding. There is, in a word, no set of police power interests that limit the protection of the property that the LECs invest in the development of their network.

In cases before the FCC, the dominant problem is to set the right rates of return for property. Even if the stated concerns of Penn Central are carried over to this context, they only throw the case back to the identical concerns that were raised by Hope. Initially, the economic impact of rate regulation is always heavy. Yet there is no question but that all investments of the regulated industry are made with explicit and distinct investment-backed expectations. These expectations are shaped by two factors. First, the rate regulation may be needed to counteract the monopoly power of the regulated party. Yet, by the same token, the takings clause guards against the risks of expropriation by the excessive use of government power. Jersey Central Power & Light Co. v. FERC, 810 F.2d 1168 (D.C. Cir. 1987). Those twin concerns have shaped all rate regulation in this entire area, so that it would be quite inconceivable to argue that a firm embarks on extensive investment in public work with the expectation that it will receive no compensation for its labors. In this instance the constitution shapes the nature of the expectations. Just as landowners are allowed to expect that they will normally receive compensation when the government physically enters their property, so too the long line of cases from Smyth v. Ames to the present has established that regulated firms are entitled to compensation for their investments in infrastructure and equipment. There is no tension between Penn Central and the Hope line of cases.

Conclusion. It seems clear, then, that the logic of Hope renders the bill and keep proposal invalid. Indeed, if anything, the logic for applying a bottom line test to this proceeding is more compelling than it was in Hope. "The primary aim of this legislation—The Natural Gas Act—was to protect consumers against exploitation at the hands of natural gas companies."

Hope, 320 U.S. at 610. That purpose may have made good sense when it was believed that the production and sale of natural gas in interstate markets was subject to monopoly forces. But this hearing differs in two vital ways from those in Hope. First, this proceeding does not directly implicate the interests of consumers at all, save insofar as all consumers as a class are benefited by the efficient set of interconnections between CMRS providers and LECs. Here, as in Eshleman, the need for the payment of just compensation is especially imperative. Whatever consumer interests are represented by CMRS providers (above and beyond the consumer interest represented by the LECs) are fully protected by able and sophisticated business entrepreneurs who are able to defend themselves equally in negotiations with the exchange carriers over mutual compensation arrangements or in any regulatory proceeding that respects, in full, the just compensation requirement.

Second, the cost of error in a Hope-like proceeding may have worked an injustice to this or that regulated firm, but it did not create any fundamental distortions in the overall operation of any given market. The entire natural gas industry was divided into local submarkets, so that it is doubtful that any error made in one proceeding did much to distort the relative prices between rival suppliers of natural gas. In this context, however, the misallocations of prices do not work for the direct benefit of consumers, but for the direct benefit of the CMRS providers. Any systematic error that denies LECs the appropriate cost recovery on their interconnections with CMRS providers commits the double whammy of forcing the LECs to subsidize their actual and potential competitors. Under these circumstances, any acceptable standard of decision should counsel the Commission against entering an order that forces the LECs to enter into a set of losing transactions without just compensation. That is doubly true when there is no necessity, real or imagined, that requires this result. The parties have already negotiated interconnection agreements between themselves that work to their mutual benefit. Sections 251 and 252 of the Act call for them to enter into good faith negotiations on matters of this sort. The existing structure thus provides full protection for any and all legitimate interest of the CMRS providers. The proposed order for bill and keep represents bad economic policy. But more to the point of this paper, it also represents a clear and manifest violation of the just compensation clause to the Constitution, both as it is written, and as the Supreme Court has applied it to rate orders.